APPELLATE CIVIL.

Before Derbyshire C. J. and Nasim Ali J.

1939

Jan. 11, 12, 13, 16, 17.

BHOLA NATH SEN

v.

JOGENDRA MOHAN DAS.*

Mortgage—Preliminary mortgage decree—Appeal against such decree—Final mortgage decree by trial Court before decision of the appeal—Effect of the decree of the appellate Court affirming the preliminary mortgage decree of the trial Court on the final mortgage decree already passed by the trial Court—Execution—Limitation—Indian Limitation Act (IX of 1908), Sch. I, Art. 183.

A preliminary mortgage decree was made on June 5, 1917, by the High Court on appeal against the decision of the Subordinate Judge of 24-*Parganâs* refusing a mortgage decree. Subsequently, on November 9, 1918, the Subordinate Judge, on the basis of the decree of the High Court, passed a final mortgage decree. Prior to such final decree, an appeal was preferred to the Privy Council against the decree of the High Court dated June 5, 1917, and the Privy Council by decree dated August 10, 1922, dismissed such appeal. On July 12, 1934, the decree-holder applied to the Subordinate Judge for execution of the final decree. Upon a contention of the judgment-debtor that the final decree under execution was a nullity inasmuch as the Subordinate Judge had no jurisdiction to pass it during the pendency of the appeal to the Privy Council against the preliminary decree, and that even if it was not a nullity when it was passed, it ceased to exist after the preliminary decree, on which it was founded, was superseded by the decree of the Privy Council:

Held that the presentation of an appeal from the preliminary mortgage decree did not take away the jurisdiction of the trial Court to take further proceedings under the preliminary decree already made and to make a final mortgage decree, and that a final decree passed in such circumstances did not become non-existent after the preliminary decree on which it was founded was superseded by the decree of the Privy Council if the latter merely affirmed such preliminary decree.

Held, further, that the period of limitation for the purpose of execution of such final decree would run from the date of the decree of the Privy Council, *viz.*, August 10, 1922, and not from the date of the final decree, *viz.*, November 9, 1918, passed by the Subordinate Judge, and that Art. 183 of the Indian Limitation Act, 1908, would apply.

APPEAL FROM ORIGINAL ORDER dismissing objections raised by the judgment-debtors against execution of a mortgage-decree for sale.

*Appeal from Original Order, No. 577 of 1936, against the order of T. C. Mukherji, Fourth Subordinate Judge of 24-*Parganâs*, dated Oct. 5, 1936, with application and Rule No. 307 of 1937.

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The following is a statement of facts material for the purpose of this report:—

Certain lands in Entally, a suburb of Calcutta, were on September 25, 1903, mortgaged to secure repayment of a loan of Rs. 7,000 with interest at the rate of 12 per cent. per annum. In 1914, the mortgagees instituted in the Court of the Subordinate Judge of 24-*Parganâs* a suit for sale upon the mortgage. In the plaint in the suit the mortgagees claimed a sale of the properties, mentioned in sch. *ga* to the plaint, which were the mortgagors' share, *viz.*, four annas, in the said lands. The Subordinate Judge held that the mortgage was invalid inasmuch as the mortgagors, who had only a four annas share in the lands, had, by the mortgage sued upon, purported to mortgage the full sixteen annas share in the lands, and passed only a money-decree for the principal and interest due under the loan. On appeal, the High Court by decree dated June 5, 1917, reversed the decision of the Subordinate Judge and directed that the usual preliminary mortgage-decree in respect of the four annas share of the mortgagors in the lands should be made. On the basis of the decree of the High Court, the trial Court, on December 22, 1917, drew up the preliminary mortgage-decree, and then, on November 9, 1918, passed the final mortgage-decree.

Before the final decree was passed as aforesaid, the mortgagors appealed to the Privy Council against the decree of the High Court dated June 5, 1917. And on the mortgagors' application to the Subordinate Judge, a stay of execution of the final decree, pending the decision of the Privy Council, was granted in March, 1922. The appeal to the Privy Council was dismissed on August 10, 1922.

On July 12, 1934, that is, in less than twelve years from the date of dismissal of the appeal by the Privy Council, but more than twelve years after the date of the final mortgage-decree as passed by the Subordinate Judge, the mortgagee decree-holders

applied to the Subordinate Judge for execution of the decree by the sale of the properties mentioned in sch. *ga* to the plaint.

A petition of objections to the execution was filed on December 19, 1934, by the judgment-debtors under s. 47 of the Code of Civil Procedure, 1908, before the Subordinate Judge, but the Subordinate Judge, by order dated September 7, 1935, overruled such objections. Thereupon, the judgment-debtors appealed to the High Court. Two of the grounds taken in the memorandum of appeal were:—

(1) That the executing Court ought to have held that the decree now sought to be executed was drawn up long before the Order of His Majesty in Council was passed and as such was not in accordance with the said Order of His Majesty in Council and cannot be executed as any such Order or otherwise.

(2) That the executing Court ought to have held that the decree now sought to be executed was barred by the law of limitation.

That appeal was, on January 17, 1936, summarily dismissed by the High Court under O. XLI, r. 11 of the Code of Civil Procedure.

Subsequently, on September 22, 1936, the judgment-debtors filed before the Subordinate Judge further objections to the execution of the decree. By order dated October 5, 1936, the Subordinate Judge rejected these objections, and directed the sale to be held at noon on that day, that is, October 5, 1936. Hence the present appeal to the High Court.

The arguments in the appeal appear sufficiently from the judgment of Nasim Ali J.

Bireswar Bagchi and *Phanindra Kumar Sanyal* for the judgment-debtors appellants.

Gunada Charan Sen, Satyendra Nath Mitra and *Susil Chandra Dutt* for the decree-holders respondents.

DERBYSHIRE C. J. [After stating the facts His Lordship proceeded as follows:]

Before us it has been contended that no execution-proceedings can take place, first, because the decree

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for sale has been superseded by the decision of the Privy Council and is no longer existing and, therefore, not executable. Secondly, it has been contended that if the decree for sale is still valid and is existent, it is time-barred. In my view, it is not open to the present appellants—the mortgagors—to take these objections here in this appeal. They raised the same objections when they appealed from the decision of the Fourth Subordinate Judge of 24-*Parganâs*, dated September 7, 1935. Those objections were made grounds of appeal to this Court and this Court rejected the appeal on January 17, 1936. Those matters are, in my view, *res judicatâ* and cannot be reagitated here in this appeal.

A great deal of time has been taken up in contending that the decree of 1918 was non-existent or that it was time-barred. Notwithstanding the conclusion to which I have come on the question of *res judicatâ*, I think it may help, though I am by no means confident, towards the final adjustment of this litigation, if I give my views upon the arguments that have been raised.

The final decree for sale was made, it is true, by the Subordinate Judge of 24-*Parganâs*, but it was made according to the Code of Civil Procedure in operation in 1918, pursuant to a decree of this Court which was made on June 5, 1917. That decree for sale is or was in effect a decree of this Court. The decree of this Court was appealed against in the Privy Council which affirmed the decree of this Court. In my view, by reason of the decision in *Jowad Hussain* v. *Gendan Singh* (1), that decree of this Court became, on its affirmance by the Privy Council, part of the order of the Privy Council as far as its legal consequences are concerned. That decree could not be executed before the Privy Council made its Order on August 10, 1922, because a stay had been granted in March of 1922 by the Subordinate

(1) (1926) I. L. R. 6 Pat. 24; L. R. 53 I. A. 197.

Judge of 24-*Parganâs*. When, however, on August 10, 1922, the Order of the Privy Council was made, time began to run for the execution of that decree, which I have held became part of the Privy Council order. The time within which it could be enforced was, in my view, twelve years from August 10, 1922, by reason of Art. 183 of the Limitation Act. These execution-proceedings were started on July 12, 1934, about one month before the expiration of the period of twelve years. They were, therefore, not barred by limitation. In my view, apart altogether from the question of *res judicatâ*, this appeal must fail.

In addition to the appeal, we have, before us, a Rule which was granted at the instance of the mortgagors calling upon the mortgagees to show cause why the decision of the same Subordinate Judge given on September 21, 1936, wherein he refused to revise the decree in the suit, should not be set aside.

The contention of the mortgagor with regard to this is that the decree does not, as far as the quantum of the property is concerned, give effect to the decision of the Privy Council. Now, Lord Phillimore, in delivering the decision of their Lordships in the appeal said (1) :—

> Their Lordships having heard a full statement of the facts of the case, and everything that could be urged by learned counsel for the appellant, are satisfied that the decree appealed from must stand.
>
> There are, in fact, on final examination but two points to be taken on behalf of the appellant.

The first point we are not concerned with. The judgment proceeds :—

> "The second point taken" (the point in question now) "is that the decree ought only to have been made in respect of 4 annas of the property, and it has, in fact, been made against 16 annas. The answer to that is that those who say this have misconstrued the decree. There is no doubt something in the language of the learned Judge of the High Court who delivered the judgment which would look as if he so thought, and possibly, as against the appellant if the Judge had so thought it might have been said, that a decree had been passed against him in respect of any interest he might have in the 16 annas; but, however that may be, when the decree came to be carefully drawn up, it is quite clear that it only affects the four annas.

(1) (1922) 27 C. W. N. 607, 610.

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I have referred to the paper book which was before their Lordships of the Judicial Committee when this matter was heard by them. Their Lordships had before them the plaint in the original suit. In the plaint, the plaintiffs asked for the sale of the property described in sch. *ga*. Their Lordships had before them the decree that was made by this Court by the learned Judges which reads :—

> It is ordered and decreed that the decree of the lower Court be set aside and in lieu thereof it is hereby ordered that the case be sent back to that Court for the purpose of taking an account as to what amount is due to the plaintiffs from the defendants under the mortgage bond dated September 25, 1903, and for fixing a date within which that amount is to be paid and in the event of the defendants failing to pay to the plaintiffs the said sum so found due within the time fixed for bringing to sale the mortgaged properties (as mentioned in the plaint) in satisfaction of the amount so found due to the plaintiffs.

The preliminary decree and the final decree both bring to sale the properties mentioned in sch. *ga*. The plaint itself asked for the sale of the properties mentioned in sch. *ga*. It has been contended here that the properties mentioned in sch. *ga* are not the same as the four annas share of the property. There is no evidence whatever in support of that contention. In my view, it is quite clear that the decree for sale in question carries out the order made by this Court on June 5, 1917, which was considered by their Lordships of the Privy Council and affirmed by them on appeal. In my opinion, on this contention, the mortgagors have failed and the Rule must be discharged.

The appellants asked for a fresh sale proclamation to be published in any new sale ordered. In my view, that matter does not come within the ambit of this appeal and we make no order on it.

The result is that this appeal must be dismissed with costs—the hearing fee being assessed at fifteen gold *mohurs*. The Rule is discharged, but without costs.

No order is necessary on the application in the alternative under s. 115 of the Code of Civil Procedure.

NASIM ALI J. I agree that this appeal should be dismissed and the Rule should be discharged.

The objections of the appellant to the execution of the final mortgage decree are two:—first, that the decree is incapable of execution and, secondly, that the application for execution is barred by limitation. The arguments in support of the first objection were two-fold. First, that the final decree under execution is a nullity inasmuch as the Subordinate Judge had no jurisdiction to pass it during the pendency of the appeal against the preliminary decree; secondly, that even if it was not a nullity when it was passed, it ceased to exist after the preliminary decree on which it was founded was superseded by the decree of their Lordships of the Judicial Committee.

The line of reasoning adopted by the appellant in support of the first branch of the contention is this:—O. XXXIV, r. 5 of the Code of Civil Procedure contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of the final decree is the existence of a preliminary decree which is final and conclusive between the parties. When an appeal is preferred, it is the decree of the appellate Court which is the final decree in the case. A final decree in a mortgage-suit can therefore be passed only after the disposal of the appeal against the preliminary decree. This contention wholly overlooks O. XLI, r. 5 of the Code of Civil Procedure which provides that an appeal shall not operate as a stay of proceedings under the decree appealed from. In mortgage-suits the preliminary decree is what in the Court of Chancery would have been described simply as "the "decree," the final decree corresponding to the "order "on further consideration". The further proceedings are proceedings under the preliminary decree and consist mainly of what Lord Hobhouse in the case of *Saiyid Muzhar Hossein* v. *Bodha Bibi* (1) described

(1) (1894) I. L. R. 17 All. 112(115); L. R. 22 I. A. 1(4).

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as "subordinate enquiries". The preliminary decree settles the rights of the parties. It contemplates a further decree to be made after the rights of the parties thus declared have been worked out by subordinate enquiries. The function of a final decree is merely to re-state and apply with precision what the preliminary decree has settled. The presentation of an appeal from a preliminary decree does not take away the jurisdiction of the Court to take further proceedings and to make a final decree. The final decree when passed is capable of immediate execution and the appeal against the preliminary decree does not operate as a stay of execution of the final decree: *Talebali* v. *Abdul Aziz* (1). I, therefore, hold that the Subordinate Judge had jurisdiction to make the final decree during the pendency of the appeal against the preliminary decree.

In support of the second branch of the contention, the appellant relied on certain observations of Banerji J. in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) which was considered by Viscount Dunedin in the case of *Jowad Hussain* v. *Gendan Singh* (3). The observations in these cases were made in connection with the question of limitation for an application for the final decree. I do not find anything in them to support the view that the final decree in a mortgage-suit is wiped off after the preliminary decree has been affirmed by the appellate Court. The plaintiff who gets a final decree during the pendency of an appeal against the preliminary decree takes the risk of the final decree being reversed or varied, if the preliminary decree is reversed or varied by the appellate Court. But where the preliminary decree is affirmed, it is difficult to find any intelligible principle on which it can be said that everything done in pursuance of that decree is wiped off. If the final decree is to be taken as destroyed as soon as the preliminary decree is affirmed by the appellate Court there will be no sense

(1) (1929) I. L. R. 57 Cal. 1013. (2) (1917) I. L. R. 39 All. 641.
(3) (1926) I. L. R. 6 Pat. 24; L. R. 53 I. A. 197.

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in the rule embodied in O. XLI, r. 5 of the Code of Civil Procedure that an appeal shall not operate as a stay of proceedings under the decree appealed from. There is a right of restitution under s. 144 of the Code of Civil Procedure only when a decree is reversed or varied. There is no such right when a decree is affirmed. It would be a meaningless superfluity to insist that, after the preliminary decree in a partition suit or a suit for accounts has been affirmed by the appellate Court, the final decree, made in accordance with the preliminary decree during the pendency of the appeal against the preliminary decree, should be set aside, the parties should be relegated to the position in which they were before the final decree was made, further proceedings for a final decree started *de novo*, and a fresh final decree should be made. Such a procedure does not benefit either of the parties. It is true that in a mortgage-suit the time for paying the mortgage-money as fixed by the preliminary decree may expire before the preliminary decree is affirmed in appeal. But it is open to the appellant to ask the appellate Court to extend the time though the appellate Court is not bound to extend the time. *Sateendranath Chaudhuri* v. *Jateendranath Chaudhuri* (1). In the present case the appellant did not do so as that would have saddled him with interest at a higher rate, namely, at the bond rate for the extended period. I have not been able to discover any principle or precedent to support the position that after a preliminary decree is affirmed on appeal all further proceedings in pursuance of such preliminary decree are destroyed. The second branch of the contention therefore also fails.

There is another difficulty in the way of the appellant so far as this point is concerned. At an earlier stage of these execution-proceedings the appellant filed a petition on December 19, 1934, under s. 47 of the Code of Civil Procedure raising

(1) (1935) I. L. R. 63 Cal. 1; L. R. 62 I. A. 265.

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this identical objection along with various other objections. The Subordinate Judge by his order dated September 7, 1935, rejected this application and ordered the execution to proceed. An appeal to this Court against this order was dismissed under O. XLI, r. 11 of the Code of Civil Procedure. It is true that in the order of the Subordinate Judge there was no finding by the Subordinate Judge on this point. But there is nothing to show that the point was not abandoned at the time of the hearing of the application before the Subordinate Judge. At any rate, the order directing the execution to proceed necessarily included the rejection of the appellant's objection that the decree was incapable of execution. When the appellant appealed against the order of the Subordinate Judge to this Court he took this objection again in his memorandum of appeal. But his appeal was dismissed as has been stated above. The appellant is therefore now precluded from raising this objection again. The first objection therefore must be overruled.

As regards the second objection, the contention of the appellant is that the present application is hit by s. 48 of the Code of Civil Procedure, as it is beyond twelve years from the date of the final decree. This argument is based on the fact that the final decree bears the date November 9, 1918, and the present application for execution was filed on July 12, 1934. The learned Subordinate Judge has held that the application is not barred as it is governed by Art. 183 of the Limitation Act. The preliminary decree on which the final decree is based was affirmed by the Judicial Committee on August 10, 1922. If I am right, in my view, that the effect of the order of the Privy Council is not to destroy but to affirm the final decree also, the present application comes under Art. 183 of the Limitation Act and is not barred by limitation. Further the appellant is now precluded from raising this question of limitation by the general principle of *res judicatâ* as this question was raised by him in his petition of objection under s. 47

of the Code of Civil Procedure filed by him before the Subordinate Judge on December 19, 1934, to which reference has already been made. It was decided against him by the Subordinate Judge and the decision of the Subordinate Judge was affirmed in appeal by this Court. The decision in the present proceedings under s. 47 that the application is not barred by limitation is now final and binding between the parties. The second objection to the execution is also overruled.

As regards the application for revision under s. 115 of the Code of Civil Procedure the contention of the judgment-debtor petitioner is that the learned Subordinate Judge should have amended the final decree in the mortgage suit by stating that only an undivided one-fourth share of sch. *ka* properties as mentioned in the plaint of the mortgage suit is to be sold. The preliminary decree that has been affirmed by the Privy Council states that the properties mentioned in sch. *ga* are to be sold. The plaint in the mortgage suit shows that sch. *ga* represents the one-fourth share of sch. *ka* properties after partition. The contention of the petitioner is that the *ga* schedule property is much in excess of the one-fourth share of sch. *ka* properties. This is a question of fact and ought to have been raised when the final preliminary decree was made by the Privy Council. Further, the learned Subordinate Judge has no jurisdiction to amend the decree of the Privy Council which affirmed the decree of this Court. The order of the Subordinate Judge cannot therefore be revised under s. 115 of the Code of Civil Procedure.

Appeal dismissed. Rule discharged.

P. K. D.